APPENDIX

Supreme Court, U. S.
FILED
JUL 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 77-1172

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED
FEBRUARY 14, 1978
CERTIORARI GRANTED MAY 15, 1978

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RELEVANT DOCKET ENTRIES
IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

07-01-75	1. Filed Complaint and Issued Summons.
07-11-75	2. Filed summons with marshals return. Served U.S. ATTY. 7-2-75.
09-11-75	3. Filed stip & order that deft time to answer etc, is extended to 10-2-75, Pierce, J.
10-24-75	4. Filed stip & order that the time for deft U.S.A. to answer is extended to 11-3-75. Pierce, J.
10-30-75	5. Filed defts Jury demand and ANSWER to the complaint. U.S. ATTY.
11-11-75	6. Filed interrogatories and request for documents, by deft, as indicated.
1-9-76	7. Filed stip & order that the time for the pltff to respond to the interrogatories and demand for documents is extended through Jan 15, 1976. Pierce, J.
1-22-76	Filed Pltffs Answers to interrogatories, etc, as indicated.

3-22-76	Filed deft's Affidavit & Notice of Motion, for summary judgment dismissing the complaint, rtble before Pierce, J. on 4-2-76.
3-22-76	Filed defts memorandum of law in support of motion etc, as indicated.
4-5-76	Filed stip & order that the return date of defts motion etc, is extended to 4-23-76. Pierce, J.
4-21-76	Filed Pltffs Affidavit, & Statement purs to Rule 9 G. and Notice of Cross Motion for summary judgment in favor of the pltff, etc, rtble before Pierce, J. on 4-23-76 as indicated.
4-21-76	Filed pltffs memorandum in opposition to defts motion for summary judgment etc, as indicated.
4-23-76	Filed deft reply memorandum of law in support of its motion for summary judgment etc, as indicated.
5-4-76	Filed Order: Since issues of fact cannot be resolved on motions for summary judgment, the cross motions for summary judgment are denied. Pierce, J. M/N.
7-9-76	Filed Stip & Order that the date for renewal for dfts. motion for

summary judgment and pltffs. cross motion for summary judgment is adjourned to 7-27-76. same time & place.....Pierce J

8-2-76 Filed stip & order that the time for renewal of defts motion for summary judgment etc, is extended to 8-30-76. Pierce, J.

9-8-76 Filed stip & order that the date for renewal of the parties respective motions for summary judgment is adjourned to 9-20-76. Pierce, J.

10-19-76 Pre Trial Conference held - Pierce, J.

3-15-77 Filed Govts. proposed findings of fact and conclusions of law.

3-15-77 Filed Govts. trial memorandum of law.

3-15-77 Filed Pltff's proposed findings of fact and conclusions of law.

3-15-77 Filed Pltff's Pretrial order.

3-15-77 Filed Pltffs' Trial memorandum.

3-22-77 Filed Pre-Trial order..... PIERCE, J.

5-24-77 Trial begun & concluded without a jury-Court finds for defendant-

Judgment to be

5-26-77 Filed order transferring proceedings to the suspense docket until further order.....PIERCE, J. m/n

6-6-77 Filed Judgment & Order in favor of deft. dismissing pltff's complaint .....Pierce, m/n. Judgment entered 6-6-77.

6/28/77 Filed notice of appeal to the USCA from the order of J. Pierce dismissing complaint dated 6/6/77 m/n

11-11-77 Filed transcript dated 5-24-77

7-27-77 Filed notice of transmission of record to US Ct.

RELEVANT DOCKET ENTRIES
IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

6-29-77	Filed copies of docket entries and notice of appeal
7-7-77	Received docket fee
7-7-77	Hoffberg, Gordon, Rabin & Engler, Esqs. filed form C
7-7-77	Hoffberg, Gordon, Rabin & Engler, Esqs. tiled form D
7-8-77	Filed affidavit ot service of forms C and D
7-11-77	Filed scheduling order #1, PC
7-12-77	Court reporter filed form D
7-27-77	Filed record (original papers of district court)
8-26-77	Filed brief, appellant, w/pfs
8-26-77	Filed joint appendix, w/pfs
9-20-77	Filed motion to enlarge the time for the filing of appellee's brief, w/pfs
9-23-77	Filed scheduling order #2 (CAMP)
10-11-77	Filed brief, appellee, w/pfs

11-10-77	Argument heard (By: Kaufman, Ch. J., Smith, Mulligan, CJJ)
11-21-77	Judgment affirmed, Kaufman, Ch. J.
11-21-77	Filed judgment
11-29-77	Filed itemized and verified bill of costs, appellee, w/pfs
12-15-77	Filed statement of costs
12-15-77	Issued mandate (opinion, judgment and statement of costs)
12-19-77	Original record returned to district court
2-27-78	Filed notice of filing of petition for writ of certiorari in Supreme Court (S.C.#. 77-1172)
4-27-78	Filed receipt of return of original record to district court.

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.,	Civil Action No.
Plaintiff,	COMPLAINT
-against-	
UNITED STATES OF AMERICA,	
Defendant.	

1. Plaintiff, National Muffler Dealers Association, Inc., is a Not-For-Profit corporation organized and existing under the laws of the State of New York with its principal office in the State, City and County of New York, said office being in the Southern District of New York.

2. The defendant is the United States of America.

3. This Court has jurisdiction in this action under the provisions of Section 1346(a)(1), Title 28, United States Code (28 U.S.C.A. §1346(a)(1)).

4. This suit is brought to recover Federal Income Taxes erroneously and illegally assessed against and collected from plaintiff by the District Director of Internal Revenue, Holtsville, New York (hereinafter "District Director") acting for and on behalf of defendant, for the plaintiff's fiscal years, 1971, 1972 and 1973.

5. Plaintiff was organized on January 18, 1971. Its purposes are to protect and promote the interests of parties engaged as franchisees in the business of automobile muffler installation and repair, to promote cooperation

among its members and to assist its members in dealing with mutual problems arising from their relationship with their franchisor. Plaintiff's membership, presently numbering , has been confined to those muffler dealers who are Midas Muffler franchisees.

6. On or about December 29, 1971, plaintiff duly filed with the Internal Revenue Service, on IRS Form 1024, an application seeking a tax exemption as a business league, pursuant to Section 501(c)(6) of the Internal Revenue Code. (Copy annexed as Exhibit A.)

7. On March 28, 1972 said application was denied and, after a District Conference had on October 4, 1972, said denial was confirmed by letter dated June 18, 1974.

8. After receipt of said confirmation, the plaintiff did, on July 22, 1974, remit to the District Director tax returns and payments for

the fiscal years, 1971, 1972 and 1973, being in the sums of $1,237.00, $1,431.00 and $2,689.00, respectively. Said payments, totalling $5,357.00, were each made under protest.

9. On September 24, 1974, the plaintiff did timely file with the District Director, on IRS Form 843, claims for refund of said tax payments, asserting that plaintiff's application for exemption as a business league had been erroneously denied. Said claims set forth the reasons for plaintiff's assertion and copies thereof are annexed hereto as Exhibit B. (Rider to Item K thereof was identical on each claim.)

10. By letter dated March 24, 1975, the defendant notified plaintiff that the claim for a refund for fiscal year 1972 had been disallowed. (Copy annexed hereto as Exhibit C.)

11. More than six months have elapsed

since plaintiff filed the aforesaid claims for a refund for fiscal years 1971 and 1973 and it is therefore presumed that said claims have been similarly disallowed.

12. Said disallowances were erroneously made as plaintiff was entitled to tax exemption as a business league pursuant to Section 501(c)(6) of the Internal Revenue Code for the reasons set forth in Exhibit B hereof, which reasons are incorporated herein.

13. As a result of the aforesaid, plaintiff is entitled to a refund of the aforesaid tax payments in the total amount of $5,357.00, plus interest from the date such payments were made. No part of said amount has been refunded to plaintiff, though duly demanded.

14. Plaintiff is the sole owner of the aforesaid claims, having made no assignment thereof.

WHEREFORE, plaintiff demands judgment against the defendant in the total amount of $5,357.00, together with interest and costs provided by law, and such other and further relief as to the Court may seem just and proper.

HOFFBERG, GORDON, FRUTKIN
& RABIN
Attorneys for Plaintiff

By: /s/ Monte Engler
Monte Engler
A Member of the Firm
32 East 57th Street
New York, New York 10022
(212) 355-2650

JURY DEMAND & ANSWER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.,	:	JURY DEMAND & ANSWER
Plaintiff,	:	75 Civ. 3228 (LWP)
-v-	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	

Defendant, United States of America, by its attorney Paul J. Curran, United States Attorney for the Southern District of New York, for its answer to the complaint herein:

1. Admits the allegations contained in paragraphs 2, 7, 8, and 10.

2. Denies knowledge or information

sufficient upon which to form a belief as to the truth or falsity of the allegations contained in paragraphs 1, 5, 11, and 14.

3. Denies each and every allegation contained in paragraphs 3, 4, 12, and 13.

4. As to paragraph 6, admits that plaintiff submitted an IRS Form 1024 dated December 29, 1971 which was received by the Manhattan District Director of IRS on February 3, 1972, the contents of which speak for itself.

5. Denies knowledge or information sufficient upon which to form a belief as to the truth or falsity of the allegations in paragraph 9 except admits that plaintiff filed Claim Form 843 dated September 19, 1974 for refund of $1,431.00 for the period from December 1, 1971 to November 30, 1972, which the Manhattan District Director of IRS received on September 25, 1975, and that Exhibit B to the

complaint purports to be copies of the claim forms filed with IRS.

FIRST AFFIRMATIVE DEFENSE

6. This court lacks subject matter jurisdiction over this action.

SECOND AFFIRMATIVE DEFENSE

7. The plaintiff fails to state a claim on which relief can be granted.

WHEREFORE, defendant prays for judgment dismissing this action together with costs and disbursements of this action, and for such other relief as is just and proper.

Dated: New York, New York

October 28, 1975.

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for Defendant.

By: /s/ John S. Siffert
JOHN S. SIFFERT
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32 East 57th St
NYC 10022
Attn Monte Engler, Esq

ORDER DENYING CROSS-MOTIONS
FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.,

Plaintiff,

- v -

UNITED STATES OF AMERICA,

Defendant.

75 Civ. 3228

----------x

ORDER

This is an action for a tax refund. Plaintiff contends that it was erroneously assessed taxes for the taxable years ending November 30, 1971, November 30, 1972, and November 30, 1973, totalling $5,357.00. Plaintiff association paid the taxes under protest on

July 22, 1974 and submitted claims for a refund to the Internal Revenue Service. When those claims were denied, plaintiff commenced this action on July 1, 1975. Jurisdiction is based on 28 U.S.C. §1346(a)(1).

Plaintiff contends that it is exempt from taxation because it is a "business league" as defined in Int. Rev. Code of 1964, §501(c)(6), 26 U.S.C. §501(c)(6)(1970), and the regulations thereunder. In this action, plaintiff is urging that the IRS denial of its claim was in error and that it is entitled to a determination that it has no tax liability. Presently before the Court are cross-motions for summary judgment.

Plaintiff is an association of 290 franchised Midas Muffler dealers organized under New York Not-For-Profit Corporation Law §402 (McKinney 1970). The certificate of

incorporation states that plaintiff was formed "to foster and promote the interests of those individuals . . . engaged in business as muffler dealers . . . [and] to advance the trade and commerce of its members . . . ." The original by-laws of plaintiff, dated April 1971, stated that membership was open to "[a]ny muffler dealer holding a valid Midas Muffler franchise . . . ." Art. II §1(a). In addition, membership was to be automatically cancelled "in the event that such member no longer retains a valid Midas franchise . . . ." Art. II §3(b). The by-laws were amended on October 23, 1972 to expand eligibility for membership by eliminating the word "Midas" from the above-quoted provisions. Nevertheless, it is undisputed that the membership of plaintiff consists solely of licensed Midas franchisees and that no effort has been made by plaintiff to

solicit non-Midas dealers for membership.

It is likewise undisputed that plaintiff was formed to provide Midas franchisees with a bargaining representative in their dealings with their franchisor, Midas International, Inc. One concrete accomplishment of the association has been the negotiation of a more favorable twenty year franchise agreement. Plaintiff also holds an annual convention, affords to members two insurance programs, and publishes a Newsletter containing information of general usefulness to Midas dealers.

Section 501(c)(6) of the Internal Revenue Code provides a tax exemption for business leagues. The applicable regulation interpreting this section is found in 26 C.F.R. §1.501(c)(6)-1 (1975), which provides as follows:

> "A business league is an association of persons having some common business interest, the purpose of which is

> to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit . . . . Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons."

Consequently, the organization claiming the exemption has the burden of proving that its primary purpose is the "improvement of business conditions" in a line of business, (here the muffler industry), rather than the performance of services for its members. The fact that the organization is neither organized for profit nor engaged in a traditionally profit-motivated activity does not by itself establish the exemption. Contracting Plumbers Coop. Restoration Corp. v. United States, 488 F. 2d 684, 688 (2d Cir.), cert. denied, 419 U.S. 827 (1974).

In deciding whether to grant summary

judgment, the Court must determine if any issues of material fact are raised after giving the party against whom the judgment is sought the benefit of all reasonable inferences. The Court on a motion for summary judgment cannot resolve issues of fact. United States v. Matheson, No. 75-6062, slip op. 2279, 2285 (2d Cir. March 3, 1976); Judge v. City of Buffalo, 524 F. 2d 1321, 1323 (2d Cir. 1975); Heyman v. Commerce & Industry Ins. Co., 524 F. 2d 1317, 1319-20 (2d Cir. 1975). As a result of the application of this test, the Court finds that there is an issue of material fact present in this case and thus the cross-motions must be denied.

Both parties have submitted Rule 9(g) statements in which they contend that there are no material issues of fact and that the only question raised is whether as a matter of law

plaintiff is entitled to the exemption. However, an examination of the papers reveals that there is a material dispute as to whether plaintiff's activities result in the improvement of business conditions in the muffler industry generally. Plaintiff contends that "the word 'Midas' is virtually synonymous with mufflers . . . ." As a result, plaintiff contends, "the influence of the Midas chain upon the muffler industry, in general, is pervasive and the activities of the plaintiff have a definite impact upon that industry." (Plaintiff's memo at 10.) In response, the defendant points out that plaintiff's Newsletter is received only by Midas franchisees. As a result, argues defendant, "[i]n no way can its activities be said to have any broader beneficial effect on the 'standards or conditions of a particular trade,' which includes non-Midas muffler dealers or on the community

at large." (Defendant's memo at 10, quoting Produce Exchange Stock Clearing Association v. Helvering, 71 F.2d 142, 144 (2d Cir. 1934)).

Each of the parties' respective positions require underlying findings of fact and neither is supported by the present record. Presently, there is not even any evidence in the record regarding Midas International's share of the market or regarding what proportion of all muffler franchisees belong to the plaintiff's association. A factual determination would be necessary before this Court could determine whether or not plaintiff's activities benefit the muffler industry as a whole. Since issues of fact cannot be resolved on motions for summary judgment, the cross-motions for summary judgment are denied.

SO ORDERED.

Dated: New York, New York
May 3, 1976

/s/ L. W. Pierce
LAWRENCE W. PIERCE
U. S. D. J.

PLAINTIFF'S EXHIBIT 6 - PLAINTIFF'S BY-LAWS DATED APRIL, 1971

BY-LAWS

of

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.

April, 1971

BY-LAWS OF NATIONAL MUFFLER DEALERS ASSOCIATION, INC.

ARTICLE I - PURPOSES

The purposes of this Association are to foster and promote the interests of those individuals, partnerships and corporations who are engaged in business as muffler dealers and installers and related activities, to promote cooperation and mutual interest among its members, to advance the trade and commerce of its members, to encourage the exchange of ideas among its members for their common good and welfare, to secure, classify and disseminate to its members all information essential or helpful in the conduct of their businesses.

The Association shall do anything necessary and proper for the accomplishment of any of the foregoing purposes or any other purpose which may be recognized as a proper and lawful objective of trade associations, all of which shall be consistent with the public interest, as well as in the interests of the members.

ARTICLE II - MEMBERSHIP

Section 1 - Eligibility for Membership

(a) Any muffler dealer holding a valid Midas Muffler franchise shall be eligible for membership.

(b) All shops under common ownership, management or control must be enrolled as members.

Section 2 - Applications For Membership

Applications for membership shall be submitted on

standard forms prepared under the direction of the Board of Directors and shall be accompanied by an enrollment fee fixed by the Board of Directors.

All dealers who are engaged in business as such dealers as of March 1, 1971 and who apply to join the Association after January 1, 1972 shall be required to pay an enrollment fee equal to the total of all dues and assessments payable by members from March 1, 1971. Any dealer who first commences doing business after March 1, 1971 shall, if he joins the Association within twelve (12) months from the date of the commencement of doing business, be required to pay dues only from the date of his application. If, however, such dealer applies to join the Association more than twelve (12) months from the date of commencement of doing business, then he shall pay an enrollment fee equal to all dues and assessments payable by members from the date of the commencement of doing business.

Section 3 - Suspension and Cancellation of Membership

(a) The membership privileges of any member of the Association shall automatically be suspended upon failure of the member to pay any applicable dues or assessments to the Association within a period of sixty (60) days following the date on which such dues or assessments are payable. Immediately upon such suspension, the suspended member shall be notified of the fact of suspension and the amount of the delinquency. In the event that within thirty (30) days from the date of said notice all delinquencies in the account of such suspended member are not cured, such membership shall, upon the expiration of such thirty (30) days' period, automatically be canceled,

provided that the Board of Directors may, at any time prior to the expiration of said thirty (30) days' period, for reasons which in its opinion justifies special consideration, defer such cancellation for such period of time as it deems warranted. In the event that a member has had its membership canceled for non-payment of dues or assessments, then such member shall not be readmitted to membership unless all amounts previously due shall be paid, together with all regular dues and assessments which may have come due during the period the member was not in good standing.

(b) Membership privileges of any member shall automatically be canceled in the event that such member no longer retains a valid Midas franchise; except that if such member's franchise has been canceled and the member is contesting such cancelation, he may continue to retain his membership until the final determination of such contest.

(c) A member may resign at any time; however, any such member requesting readmission to membership in the Association shall not be readmitted to membership unless all dues and assessments coming due during the period when he was not a member shall have been paid.

Section 4 - Voting Rights

(a) In voting for the election of members of the Board of Directors each member shall be entitled to one vote, regardless of the number of shops under the common ownership, management or control of such member.

(b) In all other cases where a membership vote is taken, voting shall be on the basis of one vote per member shop.

ARTICLE III - MEETINGS OF MEMBERS

Section 1 - Annual Meeting

The Annual Meeting of the Association shall be held at such time and place as the Board of Directors may designate.

Section 2 - Special Meetings

Special Meetings may be called by the President at the written request of at least four (4) Directors, and shall be called by the President at the written request of at least twenty-five (25) members.

Section 3 - Notices of Meeting

Notices of all Annual meetings shall be mailed to all members at least thirty (30) days in advance of the date of the meeting. Notices of all Special meetings shall be mailed at least ten (10) days in advance of the date of the meeting. The notice shall specify the date and place of the meeting and the purpose or purposes thereof, to the extent known.

Section 4 - Quorum

At all meetings of members, Special or Annual, the presence of at least twenty-five (25%) per cent of the total number of shops in the Association, whether in person or by proxy, shall constitute a quorum.

Section 5 - Voting by Mail

At any time, the Board of Directors may authorize the submission to the membership by mail ballot of any question

determined by the Directors to be submitted. Such submission and any and all other matters which under these By-Laws may or shall be determined by a mail vote shall be submitted in the following manner:

There shall be mailed to each voting member a ballot upon which each member shall record his or its vote and return it to the office of the Association. On the thirtieth (30th) day following the date of mailing of the ballots, a count shall be made of the votes cast and any ballots not received by said date shall not be counted. Unless at least twenty-five (25%) per cent of the member shops of the Association return their ballots within the aforesaid time period, none of the ballots shall be considered. A majority of the valid ballots submitted shall be necessary for the determination of any question.

Section 6 - Sectional or Regional Meetings

In addition to the Annual and Special Meetings of the members hereinabove provided for, Sectional or Regional Meetings may be called, from time to time, by the Board of Directors.

ARTICLE IV - DIRECTORS

Section 1

The management of the operations and the affairs of the Association shall be vested in a Board of Directors elected from the membership as provided herein. The duties of Directors shall include, but not be limited to, the administration of all Association funds, the management and disposition

of Association property, the formulation of policies of the Association, the determination of disputes in connection with balloting, the determination of the fiscal year of the Association, the election of officers, the recommendation of enrollment fees, dues and assessments, and such other duties as are herein prescribed.

Section 2 - Number and Qualifications of Directors

For the purposes of determining the number of Directors, the country shall be divided into five (5) Regional Territories. Said five (5) Regional Territories shall be designated as, and consist of, the areas hereinbelow provided:

WESTERN REGION

Arizona	Nevada
California	New Mexico
Colorado	Oregon
Hawaii	Utah
Idaho	Washington
Montana	Wyoming
	Alaska

MIDWESTERN REGION

Illinois	Missouri
Indiana	Nebraska
Iowa	North Dakota
Kansas	South Dakota
Michigan	Wisconsin
Minnesota	

SOUTHERN REGION

Alabama	Mississippi
Arkansas	Oklahoma
Florida	Puerto Rico
Louisiana	Texas
	Virgin Islands

SOUTH - CENTRAL REGION

Georgia	South Carolina
Kentucky	Tennessee
Maryland	Virginia
North Carolina	West Virginia
Ohio	Washington, D.C.

NORTHEASTERN REGION

Connecticut	New York
Maine	Pennsylvania
Massachusetts	Rhode Island
New Hampshire	Vermont
New Jersey	Delaware

For each full twenty (20) shops in any Regional Territory, the members in that Regional Territory shall be entitled to elect one (1) Director. If, however, there are fewer than twenty (20) shops enrolled as members in any Regional Territory, then the members in that Territory shall nevertheless be entitled to elect one (1) Director, provided that at least five (5) shops in such Territory are enrolled as members.

Section 3 - Term of Office

Upon the election of the first Board of Directors of the Association, one-third (1/3rd) of their number shall be designated to serve for three (3) years, one-third (1/3rd) for two (2) years, and one-third (1/3rd) for one (1) year, such determination to be made by the drawing of lots. Thereafter, as the term of each Director expires, his successor shall be elected for a term of three (3) years.

After a Director has served a full three (3) year term, then he shall not be eligible for re-election to the Board of Directors until the annual election of Directors next succeeding the election for which his successor shall have been elected.

Section 4 - Election by Mail Ballot - Nominating Committee

The President shall appoint a Nominating Committee of five (5) members at least one hundred and eighty (180) days

prior to the date of the Annual Meeting. The Nominating Committee shall nominate one (1) candidate for each vacancy to be filled and shall forward its slate of nominees to the office of the Association at least one hundred and twenty (120) days in advance of the Annual Meeting. The report of the Nominating Committee shall be forwarded to all members. Members may thereafter, but not less than ninety (90) days in advance of the Annual Meeting, make additional nominations of members in their own Regional Territories, provided such nominations are made by not less than five (5) members in that Regional Territory.

Promptly upon expiration of the period for submitting additional nominations, there shall be forwarded, by mail, appropriate ballots to all members in good standing. All ballots must be returned to the office of the Association not later than ten (10) days prior to the Annual Meeting in order to be eligible to be counted. Such ballots shall be retained unopened until the date of the Annual Meeting, at which time they will be handed to tellers duly appointed for the purpose of counting the same. The candidates receiving the greatest number of votes shall be declared duly elected for the offices to be filled. In the case of a tie vote, another ballot shall be taken at the Annual Meeting and all members in good standing from the Regional Territory in which there is a tie vote shall be eligible to cast a ballot in order to break the tie, which ballot shall determine the election without recourse to a further mail vote.

Section 5 - Filling of Vacancies

Whenever any vacancy shall occur on the Board of

Directors by death, resignation or otherwise, the same shall be filled temporarily by a majority vote of the remaining members of the Board from among the members in the voting group represented by the Director whose office became vacant. At the next Annual Meeting of the Association, the vacancy shall be filled and the person so chosen shall hold office for the remainder of the term of the Director whose office became vacant.

Section 6 - Meetings - Quorum

Meetings of the Board of Directors shall be held at the times and places as determined by the Board of Directors. In addition, meetings of the Board may be held on call of the President or at the written request of four (4) Directors. The presence of a majority of the Board of Directors shall be required for a quorum. Notice of all meetings of Directors shall be mailed to each Director at least ten (10) days in advance of the date of meeting, except that in the event of an emergency, Special Meetings may be held on two (2) days' notice by telegram or telephone.

Section 7 - Expenses of Directors - Reimbursement

Each Director shall be reimbursed a Tourist Class (if available) common carrier fare for his travel to and from Board Meetings attended by him during his term of office plus the cost of his hotel room.

Section 8 - Executive Committee

The Board of Directors shall select an Executive Committee, consisting of not less than five (5) members of the Board, who shall have all of the powers of the Board of Directors

between meetings of the Board. However, any action of the Executive Committee shall immediately be submitted for ratification to the entire Board of Directors by mail ballot.

ARTICLE V - OFFICERS

Section 1 - Number

The officers of the Association shall be a President, First Vice-President, Second Vice-President, Secretary and Treasurer, all of whom shall serve without compensation.

Section 2 - How Elected

At its first meeting immediately following the Annual Meeting, the Directors shall elect all of the officers from the membership of the Board of Directors.

Section 3 - Executive Director

The Board of Directors, at its discretion, may employ an Executive Director and/or other staff assistants and counsel, as the affairs of the Association may require.

Section 4 - Compensation

The Executive Director, staff members and counsel may receive such compensation as the Board of Directors may authorize. Officers shall be reimbursed for all expenses incurred by them in connection with the carrying out of their duties.

Section 5 - Disbursement of Funds

All checks drawn on the Association bank accounts must be signed by at least two (2) of the Officers and Executive Director. However, an operating account may be established on which only one of the designated signatures is necessary, and

the Board of Directors may require, in its discretion, that the signatory to such account be bonded, in which event the amount in the operating account shall not at any time exceed the amount of the bond.

ARTICLE VI - DUTIES OF OFFICERS

Section 1 - President

The President shall preside at all meetings of the Board of Directors and at all meetings of the Association. He shall appoint all committees and perform such other duties and functions as custom and parliamentary usage require.

Section 2 - First Vice-President

The First Vice-President shall assume the duties of the President at the latter's request, or in his absence.

Section 3 - Second Vice-President

The Second Vice-President shall assume the duties of the President, if the President so requests it or in the event of his absence, provided that the First Vice-President is absent or incapacitated, and in those cases where the First Vice-President has assumed the duties of the President.

Section 4 - Secretary

The Secretary shall record the Minutes of all meetings of the Association and of the Board of Directors, receive and care for all records, papers and other documents belonging to the Association, and he shall perform all other duties or functions that usually pertain to that position.

Section 5 - Treasurer

The Treasurer shall receive and properly account for all funds of the Association, keep proper records of all receipts and expenditures, and render a complete financial report at the Annual Meeting and at such other times as may be requested by the Board of Directors; he shall deposit all funds of the Association in a checking account or accounts in the name of the Association; he shall pay all bills and other obligations incurred by the Association. He may be required, at the discretion of the Board of Directors, to give bond in such amount as may be directed, the cost of which shall be paid by the Association.

ARTICLE VII - COMMITTEES

All Committees, except those herein specifically provided for, shall be appointed by the President to perform any duties which may be required.

ARTICLE VIII - DUES AND ASSESSMENTS

Section 1

Monthly dues for membership in the Association shall consist of the sum of Ten Dollars ($10.00) per month per shop, payable quarterly in advance.

Section 2

Any and all changes in the dues schedule or any assessments shall be made by the Board of Directors.

ARTICLE IX - AMENDMENTS

The By-Laws of this Association may be amended by a majority vote of the members in good standing. Proposed

amendments must be submitted to the membership in writing at least thirty (30) days in advance of the Special or Annual Meeting at which the proposed amendment will be presented. All members in good standing shall be guaranteed the opportunity to vote on all proposed amendments either by mail or at the time of the Special or Annual Meeting at which the proposed amendment will be presented.

A proposed amendment may be initiated by a majority vote of the Board of Directors or by petition signed by not less than twenty-five (25%) per cent of the member shops in any Regional Territory.

PLAINTIFF'S EXHIBIT 8 - PLAINTIFF'S CERTIFICATE OF INCORPORATION

CERTIFICATE OF INCORPORATION

OF

NATIONAL MUFFLER DEALERS ASSOCIATION, INC.

Under Section 402 of the Not-For-Profit Corporation Law

****

The undersigned, for the purpose of forming a corporation under Section 402 of the Not-For-Profit Corporation Law, hereby certifies:

1. The name of the corporation is NATIONAL MUFFLER DEALERS ASSOCIATION, INC.

2. The corporation has not been formed for pecuniary profit or financial gain and no part of the assets, income or profit of

the corporation is distributable to or inures to the benefit of its members, directors or officers, except to the extent permitted under the Not-For-Profit Corporation Law.

3. The purposes for which the corporation is to be formed are to foster and promote the interests of those individuals, partnerships and corporations who are engaged in business as muffler dealers and installers and related activities in the United States, to promote cooperation and mutual interest among its members, to advance the trade and commerce of its members, to encourage the exchange of ideas among its members for their common good and welfare, to secure, classify and disseminate to its members all information essential or helpful in the conduct of their businesses.

To do any other act or thing incidental to or connected with the foregoing pur-

poses or in advancement thereof.

Nothing contained in this Certificate shall authorize or empower the corporation to perform or engage in any acts or practices prohibited by Section 340 of the General Business Law or other anti-monopoly statute of this State.

4. The corporation is a Type A corporation.

5. The city and county in which its office is to be located are City of New York, County of New York.

6. The territory in which the corporation's activities are principally to be conducted is the United States of America.

7. The post office address to which the Secretary of State shall mail a copy of any notice required by law is c/o Gordon, Frutkin & Rabin, 32 East 57th Street, New

York, New York 10022.

8. The subscriber is of the age of nineteen years of age or over.

IN WITNESS WHEREOF, this Certificate has been signed by the subscriber this 18th day of January, 1971.

/s/ Myron P. Gordon
MYRON P. GORDON
32 East 57th Street
New York, N. Y. 10022

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

On this 18th day of January, 1971, before me personally came MYRON P. GORDON, to me known, and known to me to be the person described in and who executed the foregoing Certificate of Incorporation, and he duly acknowledged to me that he executed the same.

/s/ Ina Shapiro
INA SHAPIRO
Notary Public, State of New York
No. 31-8938240
Qualified in New York County
Commission Expires March 30, 1972

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MYRON P. GORDON, being duly sworn, deposes and says that he is the subscriber to the annexed Certificate of Incorporation and a member of the firm of BORDON, FRUTKIN & RABIN, attorneys at law; that no previous application for the approval of said Certificate by any Justice of the Supreme Court has ever been made.

Sworn to before me this
18th day of January, 1971 /s/ Myron P. Gordon
MYRON P. GORDON

/s/ Ina Shapiro
INA SHAPIRO
Notary Public, State of New York
No. 31-8938240
Qualified in New York County
Commission Expires March 30, 1972

I, SAMUEL M. GOLD, a Justice of the Supreme Court of the State of New York, of the First Judicial District of the County of New York, hereby approve the foregoing Certificate of Incorporation of NATIONAL MUFFLER DEALERS ASSOCIATION, INC. pursuant to the Not-For-Profit Corporation Law of the State of New York.

Dated, this 22 day of January, 1971."

/s/ Samuel M. Gold
Justice of the Supreme Court
of the State of New York

NO OBJECTION. NOTICE WAIVED

LOUIS J. LEFKOWITZ
Attorney General of
the State of New York

by Percy E. Schuberth
Assistant Attorney General

Dated January 20, 1971

DEFENDANT'S EXHIBIT C - LETTER FROM MONTE ENGLER TO INTERNAL REVENUE SERVICE (11/1/72)

Law Offices
GORDON, FRUTKIN & RABIN
32 East 57th Street
New York, N. Y. 10022

ELdorado 5-2650

MYRON P. GORDON
LEONARD B. FRUTKIN
JACK RABIN

MONTE ENGLER

November 1, 1972

Mr. David Landau
Internal Revenue Service
P.O. Box 3100
Church Street Station
New York, N.Y. 10008

Re: M:AU:CON:A:DL
National Muffler Dealers Association
Application for Exemption

Dear Mr. Landau:

Pursuant to our conversation of this date, this is to confirm that on Monday, October 23, 1972, at the annual meeting of the

National Muffler Dealers Association, the Association's by-laws were amended to read as follows:

ARTICLE II - MEMBERSHIP

Section 1 - Eligibility for Membership

(a) Any muffler dealer holding a valid franchise as such shall be eligible for membership.

(b) No member may enroll or remain as a member unless all shops under said member's ownership, management or control are also enrolled as members.

Section 3 - Suspension and Cancellation of Membership

(b) Membership privileges of any member shall automatically be canceled in the event that such member no longer retains a valid franchise; except that if such member's franchise has been canceled and the member is contesting such cancelation, he may continue to retain his membership until the final determination of such contest.

The amendment being in accord with our understanding of October 11, 1972, I trust that the exemption will be issued shortly.

Mr. Gordon and I wish to thank you for your assistance and cooperation in this matter. I look forward to hearing from you.

Very truly yours,

MONTE ENGLER

ME:dh

DEFENDANT'S EXHIBIT D SOLICITATION OF NEW MEMBERS (11/27/75)

NATIONAL MUFFLER DEALERS
ASSOCIATION, INC.
32 East 57th Street
New York, N. Y. 10022

ELdorado 5-2650

November 27, 1975

Dear Fellow Midas Dealer:

As the new President of the National Muffler Dealers Association, in office less than a month, I would like to take this opportunity to introduce myself.

My name is Howard Lichterman and I have been a Midas dealer since May, 1956. If I equate those 20 years with the age of our country, I have been in the Midas business for 10% as long as this country has been a country. I have been as loyal to the Midas business as I have to our country.

Our Association represents 78% of the franchised shops in the United States. In view of the fact that we are now working closely with Midas International officials in a joint endeavor to improve the Midas program, I believe it is to the interest of every dealer that we have 100% representation. Now, for the first time, there is a genuine partnership between Midas, on the one hand, and the

dealers, represented by our Association, on the other. Shouldn't you be a part of this partnership?

There are a number of areas where Association committees are being set up to assist Midas - at Midas' suggestion - to help make the Midas program an ongoing source of profit for everyone. The areas we are working on consist of:

1. New Products
2. Foreign Car Guarantees
3. Advertising
4. Forms
5. Computer Services
6. Catalogs
7. Pricing
8. Market Research
9. Growth

We need your ideas on these and other vital subjects. You need us because together we will improve your business and its profitability.

Enclosed please find membership application. We will welcome you with open arms. If you have any questions, please feel free to call me at 201-673-3000.

Sincerely,

/s/ Howard Lichterman

HOWARD LICHTERMAN
President

P.S. - We enclose copy of our November Newsletter.

BENCH DECISION OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

(Reproduced as Appendix B to Petition for Writ of Certiorari at pages 8a-15a)

JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

(Reproduced as Appendix D to Petition for Writ of Certiorari at pages 18a-19a)

DECISION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(Reproduced as Appendix A to Petition for Writ of Certiorari at pages 1a-7a)

JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(Reproduced as Appendix C to Petition for Writ of Certiorari at pages 16a-17a)

ORDER GRANTING CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. 77-1172

National Muffler Dealers Association, Inc.,

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI. Filed May 15, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.